NO. FBT-CV15-6054375-S

PAUL LIONETTI	:	SUPERIOR COURT
PLAINTIFF	:	
	:	JUDICIAL DISTRICT OF
v.	:	AT BRIDGEPORT
	:	
WESTERN CONNECTICUT	:	
STATE UNIVERSITY	:	
DEFENDANT	:	November 1, 2016

MOTION AND MEMORANDUM IN SUPPORT OF THE UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case asks the Court to review whether Western Connecticut State University ("University") complied with the minimal due process requirements of notice and a hearing when conducting a student disciplinary proceeding. Paul Lionetti ("Plaintiff") voluntarily withdrew from the University after his ex-girlfriend alleged that he had slapped, emotionally and verbally abused her, and threatened to harm himself. After a hearing, the University found Plaintiff culpable of the charges against him, and issued a sanction that consisted of a loss of privileges, specifically a one-year ban from the University property. Mr. Lionetti appealed these charges and was able to successfully lift his one year ban from the University Property. Plaintiff was not suspended or expelled, and has stated that he has no interest in returning to the University.

The University moves for summary judgment because (a) sovereign immunity bars the Plaintiff's claims against the University, and (b) because Plaintiff has not legally stated a due process claim against the University, and because the facts

demonstrate that the University has complied with the minimal requirements of due process. In support of its motion, the University attaches an affidavit from the University's Director of Judicial Affairs as well as multiple e-mails between the Plaintiff and the University, the notice sent to Plaintiff, the incident reports that form the basis of the charges against Plaintiff, student statements, the Student Code of Conduct, a transcript of the hearing, the University's Judicial Board's decision, Plaintiff's appeal documents, and the appeal decision.

UNDISPUTED FACTS

The Incident Reports

On August 26, 2015, a female student residential advisor ("Complainant") at Western Connecticut State University filed a complaint against Paul Lionetti. (Aff., Exh. A.) The Complaint alleges that Mr. Lionetti slapped and emotionally abused the Complainant during the time that Mr. Lionetti and the Complainant were in a relationship. (*Id.*) The Complainant was, at the time, a freshman student residential advisor. Mr. Lionetti was a junior and also a residential advisor. The Complainant claimed that Mr. Lionetti befriended her and told her that the other residential advisors hated her and that she should just hang out with him since the other residential advisors did not like her. (*Id.*)

Mr. Lionetti and the Complainant began dating towards the end of February 2015. (*Id.*) The Complainant describes the following incident that occurred on May 6, 2015:

> "We were lying on his bed joking around and laughing. I began to poke RA Lionetti, in which he responded by

> laughing and playfully saying to stop. RA Lionetti continued laughing but then stopped. RA Lionetti then slapped me across the face hard enough to have it sting. RA Lionetti then began crying and told me that he was a horrible person. RA Lionetti also informed me that he hears voices, which he thinks are spirits. I asked RA Lionetti if the voices told him to slap me and he told me no." (*Id.*)

In the attached incident report, the Complainant also alleges that Mr. Lionetti told her that if she broke up with him that he would drop out of school or kill himself. (*Id.*) Complainant and Mr. Lionetti continued to date until around August 16, 2015. (*Id.*) The incident report discusses their break up, and the Complainant alleges that during phone conversations Mr. Lionetti would punch a wall when upset and that he verbally harassed her. (*Id.*)

The Complainant contacted her Residential Director after her break up with Mr. Lionetti because she was concerned that Plaintiff would harm himself. (*Id.*) Residential Director, Shelah Bethke, confirmed that she knew about the break up and reassured Complainant that she had checked in with Mr. Lionetti. (*Id.*) On August 24, 2015, the Complainant met with her Residential Director and reported that Mr. Lionetti had hit her as well as other things that had happened between her and Mr. Lionetti. (*Id.*) On August 26, 2015, the Complainant met with Residential Director Bethke and the Director of Housing to make a formal report on her relationship with Mr. Lionetti. (*Id.*) The Complainant's and Residential Director Bethke's reports are attached to Charles Alexander's affidavit as Exhibit A.

Notice Provided to Mr. Lionetti Prior to His Disciplinary Hearing

Director of Judicial Affairs, Charles Alexander, began an internal investigation after he received the two incident reports. (Aff. ¶ 5.) Mr. Alexander sent Mr. Lionetti an e-mail on August 31, 2015 notifying him that he had received a report from Housing and that he would like to meet with him. (Aff. ¶ 6 and Exh. B.) Mr. Lionetti and Mr. Alexander scheduled a meeting for the next day, September 1, 2015 at 10:30 a.m. (*Id.*) At that meeting, Mr. Alexander went through the allegations in the incident reports with Mr. Lionetti. (Aff. ¶7.) Mr. Alexander also explained the disciplinary hearing process. (*Id.*)

The next day, on September 2, 2015, Mr. Alexander heard that Mr. Lionetti had decided to withdraw from the University. (Aff. ¶ 8 and Exhibit C.) Mr. Lionetti confirmed that he was withdrawing from the University, he also noted that he would not be attending his September 9, 2015 disciplinary hearing "due to the state of [his] mental health." (Aff. ¶9 and Exhibit C.) Mr. Alexander confirmed that the University Judicial Board Hearing would continue as scheduled and that "as stated in the Student Code of Conduct we will put a plea of not-responsible on your behalf and proceed with our normal process." (Aff. ¶10 and Exh. C.)

September 2, 2015 Notice Letter

On September 2, 2015, Mr. Alexander also sent Mr. Lionetti a letter notifying him of the charges against him. (Aff. ¶ 12 and Exhibit D.) The notice letter contains the date of the hearing, the date of the incident reports, and the following charges against Mr. Lionetti:

- "Regulation Violated: 4 Actual or threatened physical assault or abuse, threatening behavior, intimidation, or coercion.

- Regulation Violated: 6 Intimate partner violence is defined as: any physical or sexual harm against an individual by a current or former spouse or by a partner in a dating relationship that results from (3) domestic violence:
    - Physical abuse, which can include but is not limited to, slapping, pulling hair or punching.
    - Threat of abuse, which can include but is not limited to, threatening to hit, harm or use a weapon on another (whether victim or acquaintance, friend or family member of the victim) or other forms of verbal threat.
    - Emotional abuse, which can include but is not limited to, damage to one's property, driving recklessly to scare someone, name calling, threatening to hurt one's family members or pets and humiliating another person.

- Regulation Violated: 12 Behavior or activity which endangers the health, safety, or well-being of oneself or others."

(Exhibit D.) The notice also directed Mr. Lionetti to review a copy of Western Connecticut State University's Student Code of Conduct and Statement of Judicial Procedures. (Aff. ¶ 13 and Exhibit F.) Mr. Lionetti was also advised of his following rights:

- "You have the right to face your accusers, call witnesses in your behalf, cross-examine witnesses, and, in general, present a defense in your behalf;

- Any exculpatory evidence related to the incident(s) coming into possession of the staff of the Office of Student Affairs will be provided to you prior to the hearing;

- By making a written request to the hearing officer, and subject to state and federal statutes governing personal privacy, you may obtain a copy of the incident report(s) on which charges have been based;

- You will not be required to make any response to charges or testify in your own defense. Refusal to respond will not be regarded as evidence of guilt;

- If you do not appear for your hearing, this will not be taken as evidence of guilt. In that event, a plea of 'not responsible' will be entered in your behalf, and the hearing will proceed in a normal manner;

- Hearings are closed, but the hearing body may, in its discretion, admit any person to the hearing room."

(Exh. D.) The notice letter followed the September 1, 2015 in-person meeting between Mr. Alexander and Mr. Lionetti where they discussed the incident reports and the disciplinary hearing procedure. (Aff. ¶ 12.)

Request for a Continuance

On September 4, 2015, five days before the hearing, Mr. Lionetti e-mailed Mr. Alexander and told him that he had changed his mind and that he would be attending the disciplinary hearing. (Aff. ¶ 14.) He also stated that he would be bringing his parents as his support persons[1]. (*Id.*) On September 8, 2015 at 3:57 p.m., the day before the hearing, Mr. Lionetti sent Mr. Alexander an e-mail noting that he had recently retained an attorney and that the attorney was requesting a continuance to review the Complainant's statement and any other witness statements. (Aff. ¶ 15.) Mr. Alexander denied Mr. Lionetti's request for a continuance. (Aff. ¶ 16.) The University's Student Code of Conduct states that"[t]he Accused Student shall be afforded a reasonable time to prepare for the hearing, which period of time shall not be less than three (3) Calendar Days. The Accused

[1] The University's Student Code of Conduct defines "Support Person" as "a person who accompanies an Accused Student, a Reporting Party or a victim to a hearing for the limited purpose of providing support and guidance. A support person may not directly address the Hearing Body, question witnesses, or otherwise actively participate in the hearing process." (Exhibit F, pg. 4.)

Student, the Reporting Party and/or any alleged victim may request a delay of the hearing due to extenuating circumstances." (Exh. F, at p. 17.) The Code of Conduct also notes that in any hearing alleging intimate partner violence, the accused may "be accompanied to any meeting or proceeding by an advisor or support person of their choice, provided that the advisor or support person does not cause a scheduled meeting to be delayed or postponed." (Exhibit F, at p. 17.) Mr. Alexander denied Mr. Lionetti's request "because it was requested on the eve of the hearing and because he did not present any extenuating circumstances." (Aff. ¶ 17.)

Mr. Alexander did agree to turn over the incident reports and asked Mr. Lionetti to meet him early in the morning. (Aff. ¶ 18 and Exhibit E.) Mr. Alexander also noted in his e-mail reply to Mr. Lionetti that he had made a copy of the redacted incident reports available to Mr. Lionetti immediately after their September 1st visit. (*Id.*) Mr. Lionetti, however, decided to withdraw from the University and did not stop by to pick up the incident reports. (*Id.*)

The Disciplinary Hearing

On September 9, 2015, the disciplinary hearing took place, and the University created an audio recording of the hearing. (Aff. ¶ 20.) The University's counsel has had the audio recording transcribed, and it is attached to Mr. Alexander's affidavit as Exhibit J. The disciplinary proceedings are not courts of law, and the case against Mr. Lionetti is not presented by an attorney, and the rules of evidence and procedure do not apply. (Aff. ¶ 17 and Exh. F at p. 1.)

Prior to the hearing, Mr. Lionetti submitted a written statement. (Aff. ¶ 19, Exh. I.) Mr. Lionetti participated in the hearing, had an opportunity to question witnesses, had an opportunity to answer questions, and also had an opportunity to read his statement to the University Judicial Board. (Hearing Transcript, Exhibit J.) Mr. Lionetti's statement says the following regarding the accusation that he slapped Complainant:

> "Regarding the accusations of physical abuse, these are highly exaggerated. There was one occasion this past May when we were together in my room, where the accuser was harassing me and physically jabbing at me to point where I was visibly upset. I asked her repeatedly to stop but she continued. I had grabbed her hand previously and turned her over stating that I wished to go to sleep. She paused for a brief moment but then she resumed jabbing me. I attempted to push her hand away again and accidentally made contact. I immediately and profusely apologized because this was not my intention. At that point we did go to sleep for the night."

(Exh. I.) When the Judicial Board questioned Mr. Lionetti about this statement at the hearing he provided the following additional details,

> "she was on my left side and she kept jabbing me here, and I went like this to grab her hand, and just put it to the side, and when she went like this, she was poking me all along my side, and her head was around my chest, so I went to grab her hand, and it was, I believe, her left hand, and she pulled it away, and I went like that, as I went to grab, I ended up touching her face, and I said, 'Oh, my God, I'm so sorry,' cause I went pretty fast." (*Id.* at pg. 46.)

(Exh. J at p. 46.) When the Judicial Board asked Mr. Lionetti about an apology that he had left on Complaint's phone voice mail, Mr. Lionetti stated the following:

> "I think that was – I called her the morning after the panic attack, because she had called me that night, and

> was upset with me. I was referring to a lot of times when we had gotten into verbal arguments were maybe I had cursed, like I just quoted, 'Like I'm sick of this situation. It's a shitty situation,' and lots of times, she would think I was cursing at her, but I wasn't, I'd just be like this is stupid worrying about stupid things, and a lot of times, and I would get upset. I know that I've had like a nervous twitch, where she stated I punched a wall. I sometimes tap my fist on like a solid object to ground myself when I start getting anxious, but in no way was I ever physically like striking a wall or anything."

(Exhibit J at pg. 46.)

The University Judicial Board's Decision and Mr. Lionetti's Appeal

On September 10, 2015, the University Judicial Board found Mr. Lionetti responsible for all three charges against him. (Aff. ¶ 22, Exh. K.) The University issued a sanction of loss of privileges. The sanction stated that,

> "[y]ou have withdrawn from the university and as you stated during the hearing, you do not feel that you will return to WCSU. The University Judicial Board wanted it stated that they were surprised that you did not take ownership for any of the charges. You are banned from WCSU property until 8/20/16. If you decide to come back on 8/20/16, you are banned from residing in and visiting all residence halls. Also, you would be permitted to only attend academic activities, the libraries, and student centers. You stated to the board that you are currently seeing a counselor. If you decide to return to WCSU, you will first need to meet with the Dean of Students to ensure that you are all set to return. You are not to have contact by any means (i.e., technology, other friends, etc.) with [complainant]. If you need to come to campus for any reason, you must contact the Student Affairs office to be granted permission."

(Exhibit K.)

Mr. Lionetti filed an appeal within three days as required by the Student Code of Conduct. (Aff. Exhibit L.) Mr. Lionetti submitted the Judicial Appeal Form and claimed that all three grounds of appeal applied to his hearing. (*Id.*) The three grounds for an appeal are: (1) the procedures set forth in this Code were not followed and, as a result, the decision was substantially affected; (2) the sanction(s) imposed were not appropriate for the violation of the Code for which the Accused Student was found responsible; or (3) new information, sufficient to alter the decision, or other relevant facts were not brought out in the original hearing because such information and/or facts were not known to the Accused Student at the time of the original hearing. (Exhibit L.)

In an attachment to his September 14, 2015 appeal, Mr. Lionetti claimed that the hearing procedures were not followed and, as a result, the decision was substantially affected. (*Id.*) He pointed to the Student Code of Conduct hearing procedures, specifically the Notice Requirements. (*Id.*) The Student Code of Conduct Section 6(a) states that:

> "The notice shall advise the Accused Student of each section of the Student Code alleged to have been violated and, with respect to each such section, a statement of the acts or omissions which are alleged to constitute a violation of the Code, including the approximate time when and the place where such acts or omissions allegedly occurred."

(Exh. F at p. 17 and Exh. L.) The Student Code of Conduct also states that the "Accused Student shall be afforded a reasonable period of time to prepare for the hearing, which period of time shall not be less than three (3) Calendar Days. (*Id.*)

Mr. Lionetti alleged that he "was never provided adequate notice of the allegations and evidence to be used against him," and thus the "hearing lacked the basic fairness and due process accorded by law." (Exhibit L.)

Daryle Dennis, the Assistant Dean of Student Affairs handled the appeal. In his September 28, 2015 appeal decision letter (Exhibit L) he notes the following:

> "My office conducted an Appeals Process Review meeting with you on September 23, 2015, reviewed the incident reports, your judicial file and listened to the recording of your Judicial Hearing. Based on the fact that you were able to demonstrate (2) that the sanctions imposed were not commensurate with the gravity of the offense for which you were found responsible, I am conditionally modifying your sanctions."

(Exhibit L.) Assistant Dean Daryle Dennis made a finding that the sanction imposed was not commensurate with the gravity of the offense for which Mr. Lionetti was found responsible. He thus modified the sanction as follows:

> "effective immediately, your ban from WCSU property is lifted. You stated in your Appeal letter that you have withdrawn from the university and that you feel that you will not be returning to campus. Should you change your mind and decide to return to WCSU for any reason (student, guest), you must first request permission from the Dean of Student Affairs Office. That request must include written documentation from a licensed clinician/counselor that you are not a threat to yourself or others."

(*Id.*) Mr. Dennis also directed Mr. Lionetti to have no further contact with Complaint by any means directly or indirectly. (*Id.*)

Mr. Lionetti has not been expelled or suspended from the University. He withdrew on his own volition. (Exhibit I.)

Complaint Allegations

Plaintiff filed a complaint on November 17, 2015. The Complaint alleges violations of the United States and Connecticut Constitution's due process clauses. (Compl. ¶¶ 27 and 30.) Plaintiff claims that the University violated his due process rights in one or more of the following ways:

- "By failing to follow their own established procedure in conducting disciplinary hearings;
- By failing to allow the plaintiff to present evidence and witnesses in his favor at the disciplinary hearings;
- By failing to disclose to the plaintiff, in advance of the hearing, the evidence and/or statements to be used against him at the disciplinary hearing;
- By failing to set forth in any detail the factual charges so that the plaintiff could present a defense at the student conduct hearing;
- By failing to reschedule the hearing in order to allow plaintiff adequate opportunity to prepare a defense;
- By failing to allow plaintiff the opportunity to review the audio tapes of the September 9, 2015 hearing when preparing for the appeal;
- By actively discouraging the plaintiff from obtaining counsel and from presenting evidence in his defense.

The Plaintiff seeks both injunctive and monetary relief.

LEGAL STANDARD FOR SUMMARY JUDGMENT MOTION

A motion for summary judgment is granted where "the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. The moving party bears the burden of demonstrating "the absence of genuine issues of material facts, which applicable principles of

substantive law, entitle [it] to a judgment as a matter of law." *Buell Indus., Inc. v. Greater New York Mut. Ins. Co.*, 259 Conn. 527, 550 (2002) quoting *Doty v. Mucci,* 238 Conn. 800, 805–06 (1996). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent." *Gianetti v. Health Net of Connecticut, Inc.*, 116 Conn. App. 459, 464 (2009) quoting *Rockwell v. Quintner,* 96 Conn. App. 221, 227–28 (2006), cert. denied, 280 Conn. 917 (2006).

The party opposing a motion for summary judgment "must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." *Buell Indus., Inc.,* 259 Conn. at 550, quoting *Doty,* 238 Conn. at 805–06. "To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of genuine issues of material fact must be demonstrated by counter affidavits and concrete evidence." *Gianetti*, 116 Conn. App. at 464-65. In "[t]he absence of responsive evidentiary facts or substantial evidence outside of the pleadings to rebut the [moving party's] allegations in its motion for summary judgment" summary judgment is granted. *Id.* at 469.

ARGUMENT

The University should prevail in its summary judgment motion for the following two reasons. First, the University is an arm of the state and the doctrine of sovereign immunity applies. Plaintiff is not entitled to monetary damages without first seeking permission from the claims commissioner to sue the state, and Plaintiff must prove that an exception to sovereign immunity applies before he pursues any claim for injunctive relief. Second, even if this Court were to find that an exception to sovereign immunity applies, Plaintiff fails to allege a viable due process claim. Moreover, the facts demonstrate that the University's hearing procedures complied with the constitutional requirements of due process.

I. SOVEREIGN IMMUNITY BARS THE PLAINTIFF'S CLAIMS AGAINST THE UNIVERSITY

a. Sovereign Immunity Bars Any Monetary Claims Against the University

A review of relevant case law and Connecticut statutes demonstrates that Connecticut state universities are protected by sovereign immunity. *Brown v. Western Connecticut State Univ.*, 204 F. Supp. 2d 355, 361 (D. Conn. 2002) ("From the Court's review of the relevant case law and Connecticut statutes, it appears that the Connecticut State universities are entitled to claim immunity under the Eleventh Amendment analysis." (citing cases); *see also Fetterman v. Univ. of Conn.*, 192 Conn. 539, 552 (1984) (as a matter of state law, sovereign immunity bars suits for damages against the University of Connecticut in state court). The University is an arm of the State and thus this lawsuit is against the State. The University is an

arm of the state because the legislative and executive branches retain significant control over the Board of Trustees which controls Western Connecticut State University and other Connecticut State Universities. *Id. see also* Conn. Gen. Stat. §§ 10a-87 to 10a-99. While the Board of Trustees has significant control and discretion over state education matters, their autonomy is limited. *See Stolberg v. Caldwell*, 175 Conn. 586, 602-03 (1978). Most importantly, WCSU receives funding from the state treasury, and Conn. Gen. Stat. § 10a–89 provides that "[t]he board [of trustees] may request authority from the treasurer to issue payment for claims against the state university system, other than a payment for payroll, debt service payable on state bonds to bondholders, paying agents, or trustees, or any payment the source of which includes the proceeds of a state bond issue." Accordingly, any monetary claim against the University will come from the state treasury, and thus the University is protected by sovereign immunity.

It is well settled that the state cannot be sued without its consent. *Cox v. Aiken*, 278 Conn. 204, 211 (2006); *Sentner*, 184 Conn. at 342; *Horton*, 172 Conn. at 623. As described by the Court in *Columbia Air Services v. Dept. of Transportation*, 293 Conn. 342, 349-350 (2009), exceptions to sovereign immunity are few and narrowly construed, and of the three exceptions described by the *Columbia* Court (statutory waiver, constitutional claims to equitable relief only, and equitable claims for substantial misconduct promoting an illegal purpose in excess of officer's statutory authority), none are applicable here. Thus, "[i]n the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action

against the state for monetary damages without authorization from the claims commissioner to do so." *Id.* at 351. This is such an action, and as in the *Columbia* case, the plaintiff has failed to obtain such claims commissioner authorization. Thus, Plaintiff's claims for monetary relief are barred by sovereign immunity.[2]

b. The Court is to Narrowly Construe Exceptions to Sovereign Immunity and the Burden of Proof is on the Plaintiff to Demonstrate that an Exception Applies.

Only one of the exceptions to sovereign immunity, i.e., constitutional claims to equitable relief only, may apply to this matter. Since the Court's jurisdiction is at issue, the burden is on the Plaintiff to demonstrate that an exception to sovereign immunity applies. For the constitutional claims exception to apply, Plaintiff's allegations and factual underpinnings must clearly demonstrate an incursion upon constitutionally protected interests. *Barde v. Bd. Of Trustees of Reg'l Cmty. Colleges*, 207 Conn. 59, 64 (1988).

Plaintiff's complaint alleges that his due process rights have been compromised. (Compl. ¶27 and 30.) The fourteenth amendment to the United States' constitution prohibits any state from depriving any person of life, liberty, or

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[2] [A] plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner. In holding that the Superior Court does not have the authority to waive sovereign immunity on behalf of the state, we stated: "When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. See General Statutes §§ 4-141 through 4-165b…. This legislation expressly bars suit upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions." (Citation omitted; internal quotation marks omitted.) *Krozser v. New Haven,* 212 Conn. 415, 421, 562 A.2d 1080 (Conn. 1989).

property without due process of law. Article one, section eight of the Connecticut Constitution contains the same prohibition and is given the same effect as the fourteenth amendment to the federal constitution. *Barde*, 207 Conn. at 64 *citing Lee v. Board of Education*, 181 Conn. 69, 71-72 (1980). There are two types of due process claims, substantive and procedural due process. Here, there is no valid substantive due process claim. "Substantive due process is controverted only if state action affects a *fundamental* right, i.e., one 'implicit in the concept of ordered liberty." *Danso v. University of Connecticut*, 50 Conn. Supp. 256, 262-63 (2007) (emphasis in original, internal citations omitted.) There is no fundamental right to attend college for purposes of substantive due process analysis. *Id.*

Plaintiff may allege a procedural due process claim if he can demonstrate that the state deprived him of property or liberty. Plaintiff must make such a demonstration, and it is doubtful that he can. First, the University has not deprived him of property. As the court in *Danso* explained, "[i]t is doubtful that a college student attending a state university has a valid property interest in staying in school." *Id.* at 263. The court went on to point out that "[i]n contrast, high school students attending a public school do [have a property interest] because the opportunity for a high school education is mandated by statute and is compulsory." *Id.* A state created entitlement results in a "constitutionally protected property interest" in attending a public high school. *Id. citing Packer v. Board of Education*, 246 Conn. 89, 105 (1998). Here, Plaintiff has voluntarily withdrawn from the University. Even if a property right existed, the State/University has not deprived

him of that interest; Plaintiff himself has given up any right he may have had to continue his education at the University.

Moreover, it is unlikely that Plaintiff can meet his burden of demonstrating that he has a liberty interest at stake. It is true that an expulsion and its associated stigma can implicate a student's liberty interest. *See, e.g., Donohue v. Baker*, 976 F.Supp. 136, 147 (N.D.N.Y. 1997) ("It is well settled that an expulsion from college is a stigmatizing event which implicates a student's protected liberty interest.") Here, however, Plaintiff has not been expelled and thus there is no corresponding stigma. The University had previously banned him from University property for one year, but lifted that ban after Plaintiff's appeal. Plaintiff himself has indicated that he does not want to return to the University, and since he has withdrawn from the University he does not have a right to access the University's campus. Plaintiff must demonstrate that the state has affected a liberty interest before the Court has jurisdiction to hear this matter.

II. THE UNIVERSITY HAS COMPLIED WITH THE MINIMAL REQUIREMENTS OF DUE PROCESS IN A UNIVERSITY DISCIPLINARY HEARING SETTING

If the Court determines that there is a property or liberty interest at stake that implicates the due process clause of the United States and Connecticut Constitutions, the Court must still dismiss the complaint. The Court should grant summary judgement because the Plaintiff fails to allege a plausible due process violation, and because the attached affidavits, notice, e-mails, incident reports, student statements, Student Code of Conduct, hearing transcript, and hearing

decisions demonstrate that the University has complied with the minimal requirements of due process.

a. Requirements of Due Process in the Student Disciplinary Context

The due process clauses of both the federal and state constitutions at their core simply require that a person subjected to a significant deprivation of liberty or property be accorded adequate notice and opportunity to be heard. *Bhinder v. Sun Co. Inc.*, 263 Conn. 359 (2003); *Angelsea Productions, Inc. v. Commission on Human Rights and Opportunities*, 236 Conn. 681 (1996). The concept of due process is flexible, and calls for such protections as a particular situation demands. *Id.; Osteen v. Board of Regents of Regency Universities,* No. 91cv20247, 1992 WL 74995, at *5 (N.D.Ill. Apr. 8, 1992) *affirmed Osteen v. Henley*, 13 F.3d 221 (1993) (Due process is a flexible concept that varies with the situation; rights in a student disciplinary process not co-extensive with rights of litigants in civil or criminal trials); *Tellefsen v. University of North Carolina at Greensboro*, 877 F.2d 60 (4th Cir.1989) (In student discipline case, notice, opportunity to be heard and impartial decision maker is all that is required; not the judicial model of a civil or criminal trial); accord, *Le v. University of Medicine and Dentistry*, Civil Action No. 08-991(SRC), 2009 WL 1209233, at *9-10 (D.N.J. May 4, 2009) *affirmed* 379 Fed. Appx. 171 (3rd Cir. 2010); *Murakowski v. University of Delaware*, 575 F.Supp. 2d 571, 585-586 (D.Del.2008) (A full scale adversarial proceeding not required; a university is an academic institution, not a courtroom); *Bradley v. Oklahoma, ex. rel. Bd. of Regents of Southeastern Oklahoma State University*, No. Civ-13-293-KEW, 2014 WL

1672861 at *3 (E.D.Okla. Apr. 28, 2014) (The process that is due in a student discipline case is not a judicial model of a civil or criminal trial; only notice, an opportunity to be heard and an impartial decision maker is required) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) and *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir.1988), among others); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Indiana Court of Appeals 1996), *Ind. App. transfer denied,* Nov. 13, 1996. ("Courts have refused to require traditional formalities of legal proceedings in school suspension and dismissal cases; informal give-and-take between student and disciplinarian is all that is required) (citing, *Gorman*, 837 F.2d at 16 and *Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir.1987) among others).

b. Plaintiff's Claims do Not Arise to a Constitutional Violation, and the Facts Demonstrate that the University has Not Violated Plaintiff's Constitutional Rights.

In *Brown v. Western Connecticut State University*, 204 F. Supp. 2d 355, 365 (2002), a former University student made multiple claims against WCSU, including a due process claim. The Connecticut District Court granted the University's motion to dismiss the Plaintiff's due process claims. In that case, the student based his alleged due process violations on claims that the University refused to permit his attorney to participate in the hearing, failed to timely provide him with the evidence to be used against him, did not timely identify the witnesses against him, and by requiring him to prove that he had not committed the violations. *Id.* at 365. The student also alleged that his rights on appeal were violated because the hearing

was not tape recorded as required in the Student Handbook. *Id.* In dismissing his claims, the Court noted that there is no absolute right to counsel in school disciplinary proceedings; that the ability to cross-examine witnesses has generally not been considered an essential requirement of due process, that Plaintiff had to show that he was prejudiced by his lack of knowledge ahead of the first hearing, and that there is no constitutional right to review or appeal after a disciplinary hearing which satisfied the essential requirement of due process. *Id.* (Internal citations omitted.)

Plaintiff, here, makes many of these same claims. Plaintiff lists seven claims to support his assertion that the University has violated his due process rights. Plaintiff claims that the University failed to follow its own established procedure in conducting the disciplinary hearing, and that it failed to set forth in any detail the factual charges so that plaintiff could present a defense at the student conduct hearing. (Compl. ¶27(a) and (d).) Leaving aside that the Plaintiff does not articulate what procedures the University failed to follow, it is clear that Plaintiff cannot state a claim on these grounds. It is well established that deviations from the procedures in the Student Code, without a showing of substantial prejudice, do not constitute a deprivation of due process. A school's violation of its own regulations is unconstitutional only if those regulations are necessary to afford due process. *Winnick v. Manning*, 460 F.2d 545, 550 (2nd Cir. 1972), *see also Charleston v. Bd. of Trs. of the Univ. of Ill. at Chi.,* 741 *F.*3d 769, 774 (7th Cir.2013), *cert. denied,* 134 *S.Ct.* 2719, 189 *L. Ed.*2d 740 (2014) ("It may have been unfair for the university not

to follow its own procedures in [a student's] case, but it was not unconstitutional."); ("We have rejected similar claims of an interest in contractually-guaranteed university process many times…. But we will be clear once more: a plaintiff does not have a federal constitutional right to a state-mandated process….the State may choose to require procedures …. but in making that choice the State does not create an independent substantive right.") (Internal quotations and citations omitted).

When Plaintiff filed his appeal of the University Judicial Board's decision, he claimed that the University did not comply with its notice procedures. (Exhibit L.) The Court can review the notice attached to Mr. Alexander's affidavit as Exhibit D. The notice contains the date of the hearing, the date that the incident reports were filed, the charges against the Plaintiff, and Plaintiff's rights during the hearing. (Exhibit D.) The notice does lack "a statement of the acts or omissions which are alleged to constitute a violation of the Code" as required by the Student Code of Conduct. (Exhibit F, pg. 16, §6(a).) Plaintiff, however, is not prejudiced by this lack of a statement because he met with Mr. Alexander on September 1, 2105 at 10:30 a.m. (Exhibit B). At that meeting, Mr. Alexander went through both incident reports with Mr. Lionetti[3]. (Aff. ¶ 7.) Mr. Alexander also created redacted versions of the incident report and had them ready for Plaintiff to pick up the following day, but Plaintiff withdrew from the University and did not stop by to pick up the

[3] The United States Supreme Court has held that oral notice of the charges satisfies due process. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

incident reports.[4] (*Id.*, *see also* Exhibit B.) Eight days later, after retaining an attorney, Plaintiff requested the reports on the eve of the hearing and Mr. Alexander did provide him the incident reports before the hearing. (Exhibit E.)

Plaintiff's claim in his complaint that "[p]rior to the September 9, 2015 hearing the Plaintiff was given no information, orally or in writing that could enable him to understand the charges being levied against him" is undermined by Plaintiff's own written statement that he submitted prior to the hearing. (Compl. ¶ 14 and Exhibit I.) In the statement, Plaintiff addresses the slapping incident and provides his own version of the events. (Exhibit I.) He even dedicates a paragraph to attempting to discredit one of the student witnesses that the Complainant called. (*Id.*) Plaintiff's own statement demonstrates that he knew the charges against him and that he was aware of the allegations in the incident reports. A review of the hearing transcript also shows that the incident reports were read into the record and that Plaintiff was present and was given an opportunity to present his own version of the events. There are no hard and fast rules by which to measure meaningful notice. "An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Nash v. Auburn University*, 812 F.2d 655, 661 (8th Cir. 1987)

[4] The Court has also noted that "[t]here need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." Id. 581-82.

(collecting decisions.) Here, it is clear that Plaintiff was aware of the charges against him and had an opportunity to present his version of the events. That is all that due process requires.

Plaintiff also alleges that the University failed to allow the Plaintiff to present evidence and witnesses in his favor at the disciplinary hearing, failed to disclose evidence and statements that were to be used against him, failed to reschedule the hearing, and actively discouraged him from obtaining counsel. (Compl. ¶27(b)(c)(e)(g).) The notice itself undermines these claims. (Exh. D.) First, the notice clearly advises Plaintiff that "[y]ou have the right to face your accusers, call witnesses in your behalf, cross-examine witnesses, and, in general, present a defense in your behalf." (*Id.*)

Second, the University did disclose the incident reports upon which the charges were based to Plaintiff. (Aff. ¶¶7, 15-16.) There were two student statements that were disclosed to the Plaintiff on the morning of the hearing. (Aff. ¶19, Exhibit G and H.) Plaintiff received those statements shortly after Mr. Alexander received those statements. (Aff. ¶19.) Mr. Alexander also pointed out this fact to the University Judicial Board prior to reading the statements into the record, and he noted that the University Judicial Board members would not be able to question the witnesses since they were not present. (Exhibit J.) Plaintiff, himself, did not submit his statement to Mr. Alexander until the morning of the hearing, and thus the Complainant did not have access to his statement prior to the hearing. Plaintiff was not prejudiced by not having access to these statements since he had

an opportunity to hear the statements and rebut them during the hearing. Moreover, "due process does not invariably require the procedural safeguards accorded in a criminal proceeding. Rather, the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Brown v. WCSU*, 204 F. Supp. 2d at 365.

Plaintiff's claims that he was discouraged from obtaining counsel and that the hearing was not rescheduled also do not amount to a violation of due process. There is no absolute right to counsel in school disciplinary proceedings. *See, e.g., Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967)(no right to counsel where hearing was investigative, school did not proceed through counsel, and the individual was otherwise able to defend himself.) The University is not a court of law, and the disciplinary process is intended to be a part of the educational mission of the University. (Aff. ¶ 17.) The hearing is not held before judges, attorneys do not prosecute these matters, and the rules of criminal and civil procedure do not apply. Due process does not require a University to transform itself into a court of law. That is not desirable from a resource standpoint and is not in line with educational goals of a University. Moreover, the University Student Code does allow Plaintiff to bring a "support person." Plaintiff was aware of this fact and brought his parents as his support persons. (Aff. ¶14.) A support person can be anyone, including an attorney. A support person, however, may not directly address the Hearing Body, question witnesses, or otherwise actively participate in the hearing process. (Exh. F,

pg. 4 and 17.) A support person may also "not cause a scheduled meeting to be delayed or postponed." (*Id.* at 17.)

Plaintiff's due process rights were not violated when Mr. Alexander declined his request for a continuance. The request was made on the eve of the hearing, and Plaintiff did not present any extenuating circumstance to support his request. (Aff. ¶17.) Plaintiff was aware of the allegations against him by at least September 1, 2015, when he met with Mr. Alexander to go over the incident reports. Plaintiff had over eight days to prepare for the hearing, while the Student Code of Conduct only requires three days. (Exh. F, pg. 17.)

Finally, Plaintiff alleges a due process violation based on the fact that he was not allowed to review the audio tapes of the September 9, 2015 hearing when preparing his appeal. (Compl. ¶ 27(f).) This argument fails as a matter of law, because there is "no constitutional right to review or appeal after [a] disciplinary hearing which satisfied the essential requirements." *Brown v. Western Connecticut State University*, 204 F. Supp. 2d at 366 *citing Winnick*, 460 F.2d at 549 n. 5 (dismissing claim of due process violation based on fact that appeal hearing was not recorded.) There is no constitutional requirement that the University records its disciplinary proceedings, and thus not giving Plaintiff access to the recording to prepare for an appeal (which is not constitutionally required) cannot form the basis of a due process violation. Moreover, Plaintiff did have an opportunity to review the recording. The Student Code of Conduct states that "[u]pon request, the Accused Student may review the recording in a designated University office in order to

prepare for an appeal of the decision rendered by the Hearing Body." (Exh. F. p. 18.) The Student Code does not require the University to make the recording available to anyone other than the student. These recordings contain personal student identifying information and are subject to the Family and Educational Rights and Privacy Act. Furthermore, Plaintiff cannot show substantial prejudice since he was able to successfully submit his Judicial Appeal Form (Exh. L) and was granted relief through his appeal.

CONCLUSION

For the foregoing reasons, the University requests that the Court: (a) find that sovereign immunity bars all of Plaintiff's claims for monetary damages; (b) find that Plaintiff has not met his burden of demonstrating that the constitutional claim for non-monetary relief exception to sovereign immunities applies to this case where Plaintiff has voluntarily withdrawn from the University; (c) find that Plaintiff has not stated a due process violation as a matter of law; and (d) find that the undisputed facts demonstrate that the University complied with the minimal notice and hearing requirements of due process.

WESTERN CONNECTICUT STATE UNIVERSITY

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CERTIFICATION

I hereby certify that a copy of the foregoing was e-mailed, this 1st day of November 2016 to: Paul M. Cramer pmcramer@sbcglobal.net.

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